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CATHY A. CATTERSON, CLERK
U.S. COURT OF APPEALS

NOT FOR PUBLICATION

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

THEODORE CHESTER KULAS,

Plaintiff - Appellant,

v.

**STATE OF ARIZONA; RICHARD L.
PRATT, ADOC Health Service
Coordinator; T. JOLLEY, So Regional
Health Administrator,**

Defendants - Appellees.

No. 04-15527

D.C. No. CV-02-00068-DCB

MEMORANDUM*

Appeal from the United States District Court
for the District of Arizona
David C. Bury, District Judge, Presiding

Submitted October 21, 2005**
San Francisco, California

Before: **BEEZER** and **KOZINSKI**, Circuit Judges, and **CARNEY**,
District Judge.

* This disposition is not appropriate for publication and may not be cited to or by the courts of this circuit except as provided by 9th Cir. R. 36-3.

** This panel unanimously finds this case suitable for decision without oral argument. See Fed. R. App. P. 34(a)(2).

*** The Honorable Cormac J. Carney, United States District Judge for the Central District of California, sitting by designation.

1. In civil rights claims brought under the Americans with Disabilities Act, attorney's fees can be granted to prevailing defendants only in "exceptional cases when the action is unreasonable, frivolous, meritless, or without foundation, or when the plaintiff continues to litigate after it clearly becomes so." Herb Hallman Chevrolet, Inc., v. Nash-Holmes, 169 F.3d 636, 645 (9th Cir. 1999); see also 42 U.S.C. § 12205; Brown v. Lucky Stores, Inc., 246 F.3d 1182, 1190 (9th Cir. 2001). The district court was within its discretion in determining that Kulas's claims—filed within one month of nearly identical state court claims and a separate, nearly identical federal lawsuit—were "baseless, meritless, and frivolous."

The district court properly considered Kulas's ability, as a pro se plaintiff, to "recognize the objective merit (or lack of merit) of [his] claim." Miller v. Los Angeles County Bd. of Educ., 827 F.2d 617, 620 (9th Cir. 1987). After finding that Kulas "has represented himself in approximately 19 lawsuits filed in the District of Arizona alone . . . [and] has represented himself before the Ninth Circuit more than 20 times, with some success," the district court was within its discretion in determining that Kulas "should be able to recognize the merits, or lack thereof, of his claims."

The district court also properly considered Kulas's financial resources, see id. at 621, finding that Kulas's "lack of resources . . . has not deterred [him] in the least." The district court further found that "any 'financial ruin' which may potentially befall [Kulas] is due to frivolous suits such as this, a situation entirely of [Kulas's] own creation." Thus, the district court was within its discretion in deciding to award attorney's fees to Arizona.

2. Kulas did not raise below his constitutional objections to the hourly rate used by the district court in calculating the fee award, and we decline to consider them for the first time on appeal. See United States v. Carlson, 900 F.2d 1346, 1349 (9th Cir. 1990). The hourly fee limitations prescribed by the Prison Litigation Reform Act apply only to lawsuits in which attorney's fees are awarded to the plaintiff, see 42 U.S.C. §§ 1997e(d)(1)(A), (d)(3), and thus are inapplicable here. The district court was within its discretion in calculating the fee award against Kulas. See Jordan v. Multnomah County, 815 F.2d 1258, 1262–63 (9th Cir. 1987) (fee award calculated by multiplying a reasonable hourly rate by the number of hours reasonably spent working on the case is presumptively reasonable).

AFFIRMED.